TALKING PAPER

ON

POSSIBLE REVISIONS TO 10 U.S.C. § 2320 (2012)

PURPOSE

Section 813 of the FY16 NDAA requires the Secretary of Defense to establish a joint industry-government panel to review 10 U.S.C. §§ 2320 and 2321 and implementing rules to ensure "that such statutory and regulatory requirements are best structured to serve the interests of the taxpayers and the national defense." This talking paper presents an updated option for revising 10 U.S.C. § 2320 (2012) based on previous discussions.

DISCUSSION

- An option for streamlining 10 U.S.C. § 2320 was presented to the Panel at the November 10, 2016, meeting. The panel discussed potential updates to that version.

- Some potential updates discussed are addressed in the attached:

    -- Data pertaining to installations and training is addressed at (b)(3).

    -- Considerations regarding the relative investments of the parties are at (c)(2).

    -- Data pertaining to maintenance is addressed in terms that relate to sustainment and core logistics capabilities at (c)(3).

    -- Express coverage for computer software has been added at (d).

- Changes not included in the attached though previously discussed:

    -- Trade secrets are covered in the context of a contractor or subcontractor's "economic interests."

    -- Requirement for acquisition planning should be handled through policy.

- Tension Points – Consolidated according to general concerns to facilitate future discussions. (Attachment 2)

Attachments:

1. Updated Revisions to 10 U.S.C. § 2320
2. Grouped Tension Points

Attachment 1 – Proposed 10 U.S.C. § 2320

10 USC 2320: Rights in technical data

From Title 10-ARMED FORCES,

Subtitle A-General Military Law
PART IV-SERVICE, SUPPLY, AND PROCUREMENT
CHAPTER 137-PROCUREMENT GENERALLY

§2320. Rights in technical data (Proposed)

(a)(1) The Secretary of Defense shall prescribe regulations, to be included in the regulations of the Department of Defense prescribed as part of the Federal Acquisition Regulation, defining the legitimate interests of the United States and of a contractor or subcontractor in technical or other data.

(2) Such regulations shall ensure that the Department of Defense does not pay more than once for the same work; ensure that Department of Defense contractors are appropriately rewarded for their innovation and invention, provide for cost-effective reprocurement, sustainment, modification, and upgrades to Department of Defense systems; encourage the private sector to invest in new products, technologies, and processes relevant to the missions of the Department of Defense; and ensure that the Department of Defense has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use.

(3) Such regulations will promote free competition and enterprise without unduly encumbering future research and development; and promote dissemination, commercialization, public availability of technical and other data resulting from federally supported research and development.

(b) General Extent of Regulations.—

(1) Other rights not impaired.— Regulations prescribed under subsection (a) may not impair a right of the United States or of a contractor or subcontractor in a patent or copyright or another right otherwise established by law.

(2) Source Selection.— The Government shall evaluate a contractor's or subcontractor's offer to sell or license to the United States any technical data and the rights thereto as part of its evaluation of an offeror's proposal to meet the Government's needs. When doing so, the Government shall not require a contractor or subcontractor (or a prospective contractor or subcontractor), as a condition of being acceptable or as a condition for the award of a contract, to--

(i) sell or otherwise relinquish to the United States any rights in technical data except--

(I) rights in technical data for which a use or release restriction has been erroneously asserted by a contractor or subcontractor;

(II) rights in technical data that constitutes a correction or change to data furnished by the United States; relates to form, fit, or function; is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); pertains to an interface between Defense systems or modules of a Defense system; or is otherwise publicly

available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure; or

(ii) refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in data under subparagraph (B).

(3) Operation, Maintenance, Installation, and Training Data.— Data pertaining to operation, maintenance, installation, and training may not be restricted unless that data is detailed manufacturing or process data and does not pertain to an interface between Defense systems or modules of a Defense system.

(4) Form, Fit and Function Data.— Data pertaining to data items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements may not be restricted. For computer software, form, fit and function data means data identifying source, functional or logical characteristics, and performance requirements but specifically excludes the source code, algorithms, processes, formulas, and flow charts.

(5) Enabling Modular Open Systems Approaches.—Regulations prescribed under subsection (a) shall support any requirements for modular open system approaches.

(6) Special Licenses.— The Secretary of Defense may agree to restrict rights in technical data otherwise accorded to the United States under this section if the United States receives a royalty-free license to use, release, or disclose the data for purposes of the United States (including purposes of competitive procurement).

(7) Treatment of Independent Research and Development and Bid and Proposal Costs.— The Secretary of Defense shall specify the manner in which independent research and development and bid and proposal costs shall be treated and shall define conditions and criteria that balance the legitimate interests of the United States and of a contractor or subcontractor regarding the extent to which amounts spent for independent research and development and bid and proposal costs shall be considered to be exclusively with Federal funds, exclusively at private expense, or in part with Federal funds and in part at private expense, for the purposes of the definitions under this paragraph.

(8) Treatment of Other Indirect Costs.— The Secretary of Defense shall specify the manner in which indirect costs other than independent research and development and bid and proposal costs shall be treated and shall define conditions and criteria that balance the legitimate interests of the United States and of a contractor or subcontractor regarding the extent to which amounts allocated to other indirect costs shall be considered to be exclusively with Federal funds, exclusively at private expense, or in part with Federal funds and in part at private expense, for the purposes of the definitions under this paragraph. Indirect costs identified with two or more final cost objectives shall be considered in part with Federal funds and in part at private expense for the purposes of the definitions under this paragraph, when at least one final cost objective relates to incurred for a Government funding agreement.

(9) Priced Contract Options.— Solicitations and Contracts shall include, to the maximum extent practicable, a priced contract option for a period of time (not to exceed 20 years) for the future delivery of technical data and intellectual property rights needed to organically or competitively sustain such systems and subsystems over their life cycle, which were not acquired upon initial contract award.

(10) Presumption of Development Exclusively at Private Expense.— The Secretary of Defense shall specify the respective rights of the United States and the contractor or subcontractor (at any tier) regarding any technical data to be delivered under the contract and providing that, in the case of a contract for a commercial item, the item shall be presumed to be developed at private expense unless shown otherwise in accordance with section 2321.

(11) Delivery.— Solicitations and Contracts shall include, to the maximum extent practicable, a requirement for delivery, e.g., deferred delivery, constructive delivery, of technical or other data necessary to design, manufacture, and sustain the Defense system, as well as to support re-competition for production, sustainment, or upgrades.

(12) Assertion of Restrictions on Government Use.— Solicitations and Contracts shall include, to the maximum extent practicable, a requirement for an offeror or contractor, respectively, to identify, in their proposal, or, in the case of a contract, in advance of delivery, technical or other data which is to be delivered with restrictions on the right of the United States to use such data.

(13) Withholding of Payment.— Solicitations and Contracts shall include, to the maximum extent practicable, a provision authorizing the withholding of payments under the contract (or exercise such other remedies, as appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical or other data.

(14) Deferred Ordering.— Solicitations and Contracts shall include, to the maximum extent practicable, a provision authorizing for a reasonable period of time the ordering and delivery of technical or other data that has been generated or utilized in the performance of a contract, and compensate the contractor only for reasonable costs incurred for having converted and delivered the data in the required form, upon a determination that—

(A) the technical or data is needed for the purpose of basic or applied research; or reprocurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process; and

(B) the technical data—

(i) pertains to an item or process developed in whole or in part with Federal funds; or (ii) pertain to an interface between Defense systems or modules of a Defense system.

(15) Replenishment Parts.— The Secretary of Defense shall by regulation establish programs which provide domestic business concerns an opportunity to purchase or borrow replenishment parts from the United States for the purpose of design replication or modification, to be used by such concerns in the submission of subsequent offers to sell the same or like parts to the United States. Nothing in this subsection limits the authority of the head of an agency to

impose restrictions on such a program related to national security considerations, inventory needs of the United States, the improbability of future purchases of the same or like parts, or any additional restriction otherwise required by law.

(16) Acquisition Planning.— The Secretary of Defense shall require program managers for major weapon systems and subsystems of major weapon systems to assess the long-term technical data needs of such systems and subsystems and establish corresponding acquisition strategies that provide for technical data rights needed to sustain such systems and subsystems over their life cycle. Such strategies may include the development of maintenance capabilities within the Department of Defense or competition for contracts for sustainment of such systems or subsystems. Assessments and corresponding acquisition strategies developed under this section with respect to a weapon system or subsystem shall—

(1) be developed before issuance of a contract solicitation for the weapon system or subsystem;

(2) address the merits of including a priced contract option for the future delivery of technical data that were not acquired upon initial contract award;

(3) address the potential for changes in the sustainment plan over the life cycle of the weapon system or subsystem; and

(4) apply to weapon systems and subsystems that are to be supported by performance-based logistics arrangements as well as to weapons systems and subsystems that are to be supported by other sustainment approaches.

(17) Covered Government Support Contractor.— In this section, the term ‘‘covered Government support contractor’’ means a contractor under a contract the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government’s management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), which contractor—

(1) is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) executes a contract with the Government agreeing to and acknowledging—

(A) that proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

(B) that the covered Government support contractor will enter into a non-disclosure agreement with the contractor to whom the rights to the technical data belong;

(C) that the covered Government support contractor will take all reasonable steps to protect the proprietary and nonpublic nature of the technical data furnished to the covered Government support contractor during the program or effort for the period of time in which the Government is restricted from disclosing the technical data outside of the Government;

(D) that a breach of that contract by the covered Government support contractor with regard to a third party’s ownership or rights in such technical data may subject the covered Government support contractor—

(i) to criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(ii) to civil actions for damages and other appropriate remedies by the contractor or subcontractor whose technical data is affected by the breach; and

(E) that such technical data provided to the covered Government support contractor under the authority of this section shall not be used by the covered Government support contractor to compete against the third party for Government or non-Government contracts.

(18) Other Authorized Releases, Disclosures and Uses.— The Secretary of Defense shall by regulation authorize the release, disclosure or use of technical or other data to persons outside the Government, if—

(i) such release, disclosure, or use—

(I) is necessary for emergency repair and overhaul;

(II) is to a covered Government support contractor of any technical data delivered under a contract for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of the program or effort to which such technical data relates; or

(III) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;

(ii) such release, disclosure, or use is made subject to a prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and

(iii) the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use.

(c) Factors to be Considered in Prescribing Regulations.— The following factors shall be considered in prescribing regulations under subsection (a):

(1) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (Public Law 97–219, 15 U.S.C. 638 note), and the declaration of policy in section 2 of the Small Business Act (15 U.S.C. 631);

(2) The relative investments made by the United States and a contractor or subcontractor in a product or process, considered in light of the economic viability of such product or process;

(3) The interests of the United States in sustaining the readiness and operational capability of defense systems, maintaining a core logistics capability, ensuring that not more than 50 percent of the funds made available in a fiscal year to a military department or Defense Agency for depot-level maintenance and repair workload are used under contracts for the performance by non-Federal Government personnel of such workload for the military department or the Defense Agency, and increasing competition and lowering costs by developing and locating alternative sources of supply, manufacture, and support;

(4) A contractor or subcontractor's economic interests in data as they relate to making commercial technology or innovative noncommercial technology available to the Department of Defense and encouraging private investments in response to national security needs; and

(d) Regulations prescribed under this section shall include coverage for computer software and shall generally be consistent with the requirements contained herein.

Attachment 2 – Tension Points Summary

Regulatory
Statutory

1. **Business model concerns.**
   - **a.** Difference in business plans between government and industry.
   - **b.** Commercial return on investment over years versus depot and competition requirements.
   - **c.** For-profit model versus non-profit business model conflict.
   - **d.** Government as customer versus Government as competitor (depot; labs).

2. **Acquisition planning and requirements.**
   - **a.** GPR: Scope, sunset, one size does not fit all paths to competition.
   - **b.** Depot-level maintenance capability/requirements.
   - **c.** Sustainment is more than maintenance
   - **d.** What is necessary to comply with 2320(e)(3)'s requirement to address TD (and CS) needs in view of potential changes to sustainment strategy.
   - **e.** Access for limited purposes (cyber review; airworthiness; approvals) versus delivery as a CDRL under DFARS.
   - **f.** Software maintenance/sustainment requirements.
   - **g.** CDRL requirements for fundamental research programs versus CDRL needs for production/sustainment.
   - ~~**h.** Legacy programs v. new starts.~~
   - **i.** Loss of (sustainment) support

3. **Source selection concerns.**
   - **a.** Data rights as an evaluation factor.
   - **b.** IP valuation versus evaluation factors and priced CLINs.
   - **c.** Bid protest versus need to evaluate legality/business case for IP terms in proposals.
   - **d.** Need for Government flexibility to use existing tools versus need for legal review of H clauses and evaluation criterion (versus 10 U.S.C. 2320; versus CICA).

4. **Balancing the interests of the parties.**
   - **a. Funding as proxy.**
     - **i.** Mixed funding: restore pre-2012 statutory language
     - **ii.** Indirect cost pools are considered privately funded
     - **iii.** Treatment of IRAD versus SFRAD for IP rights determinations.
     - **iv.** Funding test for rights: is it the correct test or is there a less complex alternative?
     - **v.** IRAD risk correct for limited/restricted rights?
     - **vi.** Commercial items vs noncommercial items

   - **b. Rights in relation to needs.**
     - **i.** Commercial software terms versus Government-unique requirements.
     - **ii.** Authorized release and use of limited rights TD (two different points).
     - **iii.** Balance need for rights in IP versus need for competition.

iv. Are existing rights sufficient for depot, or is there a need for depot-specific, service specific, and program specific licenses.

5. **Implementation concerns.**
   - **a.** Software versus technical data.
   - b. Need to recognize differences between technical data and computer software versus need for simplified contracting.
   - **c.** Development versus adaptation.
   - **d.** Form, fit & function (vs. segregation/reintegration or interface) technical data; software documentation versus FFF.
   - **e.** OMIT versus detailed manufacturing and process data (DMPD).
   - f. Rigid IP requirements versus need for flexible arrangements.
   - **g.** Poor DID alignment with statutory/regulatory categories (FFF, OMIT, etc.).
   - **h.** Poor alignment between 10 U.S.C. 2320 and other markings (e.g., distribution statements), clauses (DFARS 252.204-7000), and contract attachments (DIDs; DAL).
   - **i.** 10 U.S.C. 2321 protections versus complexity too high to get meaningful case law.
   - **j.** Embedded software (the object code) versus source code (human-readable) and software design documentation (the data used to produce the object code).
   - **k.** Mandatory flow-down (commercial subs and suppliers).
   - **l.** Segregation "at the clause level"—applying non-commercial clauses to commercial TD/CS.

6. **Compliance/Administrative concerns.**
   - **a.** How to keep CDRLs up-to-date.
   - **b.** Small Business Innovation Research (SBIR) – flow down to suppliers; inability to share with primes; how evaluated.
   - **c.** Lack of trained personnel versus needs for IP strategy; draft SNLs; DFARS 227.7103-1; IP valuation.
   - **d.** Data assertion list (7017) – burden on contractor to prepare/Government to receive versus benefit to Government; confusion over lists lead to contract delays.
   - **e.** Complexity of the IP scheme versus ability of commercial and small businesses to comply.

7. **Data Acquisition concerns.**
   - a. Deferred ordering period: 6 years (rather than perpetual).
   - b. Time limits on [priced] contract options – generally 5 years, extendable to 10?
   - **c.** Deferred Ordering Part 1: only data "generated" under the contract.
   - **d.** Deferred Ordering Part 2: all interface or major systems interface data may be ordered regardless of USG development funding.
   - **e.** Failure to define and order CDRLs/reliance on deferred ordering and DAL to obtain data.
   - f. Deferred delivery versus escrow.

8. **Modular Open Systems Architectures (MOSA) concerns.**
   - **a.** GPR in MSI even if DEPE and MSI developed with mixed funding.

b. GPR in interfaces developed with mixed funding.
c. Open interfaces versus preference for industry standards; standards maintenance.